No. 20442

United States Court of Appeals
For the Ninth Circuit

ANTHONY G. NOTARAS, *Appellant,*

vs.

F. C. RAMON and JANE DOE RAMON, his wife; ARTHUR DROVETTO and JANE DOE DROVETTO, his wife; DONALD F. HANSON and JANE DOE HANSON, his wife; and DONALD KOBLE and JANE DOE KOBLE, his wife, and the respective marital communities formed by each married defendant, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEES

A. L. NEWBOULD
Corporation Counsel
CHARLES R. NELSON
Assistant.
Attorneys for Appellees.

10th Floor, Seattle Municipal Building
Seattle, Washington 98104

THE ARGUS PRESS, SEATTLE, WASHINGTON

No. 20442

United States Court of Appeals
For the Ninth Circuit

ANTHONY G. NOTARAS, *Appellant,*

vs.

F. C. RAMON and JANE DOE RAMON, his wife; ARTHUR DROVETTO and JANE DOE DROVETTO, his wife; DONALD F. HANSON and JANE DOE HANSON, his wife; and DONALD KOBLE and JANE DOE KOBLE, his wife, and the respective marital communities formed by each married defendant, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEES

A. L. NEWBOULD
Corporation Counsel

CHARLES R. NELSON
Assistant.

Attorneys for Appellees.

10th Floor, Seattle Municipal Building
Seattle, Washington 98104

THE ARGUS PRESS, SEATTLE, WASHINGTON

INDEX

TABLE OF CASES

United States Court of Appeals
For the Ninth Circuit

ANTHONY G. NOTARAS, *Appellant,* vs. F. C. RAMON and JANE DOE RAMON, his wife; ARTHUR DROVETTO and JANE DOE DROVETTO, his wife; DONALD F. HANSON and JANE DOE HANSON, his wife; and DONALD KOBLE and JANE DOE KOBLE, his wife, and the respective marital communities formed by each married defendant, *Appellees.*	No. 20442

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEES

STATEMENT OF PLEADINGS AND FACTS

This is an action in which the appellant seeks recovery of damages from the appellees under The Civil Rights Act, wherein appellant alleges that the appellees denied him due process of law in violation of 42 U.S.C. § 1983. Appellant contends that he was unlawfully detained in the jail of The City of Seattle after being legally arrested, and asserts Federal jurisdiction under the above mentioned statute and 28 U.S.C. § 1343. At the conclusion of the trial, the court held that the appellees Dravetto, Hanson and Coble had nothing to do with appellant's detention in the City Jail and dismissed the action as to them, for that reason. The District Court dismissed the action as to appellee Ramon for the reason

that the appellant was detained in the City Jail for only a reasonable time, and appellant's rights were not violated thereby (St. 143, 144, 145).

COUNTERSTATEMENT OF THE CASE

The appellant was lawfully arrested by some of the appellees at about 10:00 p.m. on January 20, 1964 in The City of Seattle on suspicion of larceny with an alternate charge of being drunk and resisting arrest, and was held without being formally charged with any specific crime until approximately 10:40 a.m. on January 22, 1964, at which time appellant was formally charged with being drunk and resisting arrest. Shortly thereafter, he was released on personal recognizance (Tr. 9, 10).

Appellants' arrest followed the theft of two suitcases, valued at $275.00, from the lobby of the Greyhound Bus Depot in The City of Seattle about 9:45 or 10:00 p.m., Monday night, January 20, 1964. The suitcases belonged to two seventeen-year-old girls. While the girls were in the lobby with their suitcases on the floor by them, a man stepped up to them and volunteered to watch the suitcases for them. The girls declined the proffer of his services. After the man left, the girls went to the ladies' room, leaving the suitcases where they were. When the girls returned, their suitcases were gone, and they started searching for them. A Mr. Small told them that he had seen the man who had spoken to them return while the girls were in the ladies' room and take the suit-

cases (St. 62, 63). The girls went out onto the sidewalk and made inquiry and a taxi driver, a Mr. Kasmurski, told the girls that he saw a man leaving the bus depot with two suitcases which fitted the description of the girls' suitcases. Shortly thereafter, the taxi driver saw a man enter a tavern whom he identified as the one he had seen leaving the bus depot with the suitcases and when he returned to the bus depot he relayed this information to the girls and a police officer with whom they were talking. He went with the police to the tavern and pointed out the appellant, who was arrested (St. 53).

About 9:00 o'clock on the morning following appellant's arrest, his file was assigned to Detective Moran (St. 42) who proceeded to the city jail and talked to appellant (St. 43, 44). At that time, Detective Moran asked appellant if he wished to use the telephone, but appellant declined the offer, stating that he had no telephone at his home. Detective Moran then volunteered to go to appellant's home and inform appellant's wife of his arrest and arrange for her to pick up appellant's car which was parked on a street (St. 49, 50). This, Detective Moran did, and he arranged for appellant's wife to see appellant that same morning, and she saw appellant for about a half hour that morning (St. 29, 30, 32). She spent the afternoon in an effort to employ an attorney for appellant, and was successful late that afternoon (St. 30, 31).

Before going to see Mrs. Notaras on Tuesday morning, Detective Moran checked all the taverns in the area surrounding the Roll-In Tavern, where appellant sometimes worked, to see if he could find any witnesses who remembered the appellant, but most of the taverns were closed and would not be opened until later in the day. He also checked the restaurants in the area to see if any suitcases had been left or if any witnesses remembered a person who fitted appellant's description, but he could find no one (St. 49, 53).

Shortly after noon on Tuesday, Detective Moran tried to contact the cab driver who had, the night before, identified appellant as the person he had seen leaving the bus depot with the stolen suitcases (St. 53). He was unable to contact the taxi driver until 4:00 p.m., when he was able to talk to him on the phone, at which time the taxi driver said he would come to the Police Station at 8:00 a.m. the following morning (St. 54). When the taxi driver arrived the next morning, he again identified appellant as the man he saw leaving the bus depot with the two suitcases (St. 60, 61).

On Tuesday afternoon at 1:30 or 2:00 p.m., Detective Moran found the Roll-In Tavern open and its owner, Mr. Jewett present. Appellant was sometimes employed by Mr. Jewett as a part-time barkeeper, and on the preceding evening, the evening appellant was arrested, appellant came into the Roll-In Tavern at about 8:45 (St. 55, 56). At approximately 10:00 p.m., Mr. Jewett told

appellant he could go to work at 10:30 p.m., so appellant told Mr. Jewett he would leave and get some coffee and return. Mr. Jewett said appellant did leave, but he did not know in which direction, and of course he did not return (St. 56, 57, 58).

On Tuesday, Detective Moran tried to contact the two victims, the girls whose suitcases had been stolen, but was not successful. However, he did talk to the mother of one of the girls and asked the mother to talk to the girls and relate the information she got from them by telephone (St. 58). This was done on Wednesday morning, January 22nd. The information conveyed by the mother indicated that there was a problem of identification so far as the appellant was concerned. The girls felt that the man taken into custody the appellant, was not the same man who had approached them in the bus depot prior to the theft of the suitcases. A witness, Mr. Small, had stated that the same man who had talked to the two girls was the man who picked up the suitcases and left the depot (St. 62, 63). Yet, the taxi driver, when he talked to Detective Moran on Wednesday morning, still felt strongly that appellant was the person he saw leaving the bus depot with the two suitcases (St. 60, 61).

Detective Moran, after considering the time element in question, the conflicts in identification by eye witnesses, and the over-all impressions he had obtained of the case, felt it better not to charge appellant with larceny (St. 61).

On the morning of January 22, 1964, appellant's attorney obtained an order for a writ of habeas corpus directed to appellee, F. C. Ramon, to produce appellant in the Superior Court at 1:45 p.m. that date, and show cause why appellant should not be restored to his liberty. The writ of habeas corpus, and a certified copy of the order was served upon the secretary of appellee, F. C. Ramon, at 11:00 a.m. that same day; and the writ was dismissed upon its return at 1:45 p.m. as appellant had been charged with being drunk in public and resisting arrest and was admitted to bail shortly after 11:00 a.m. on that date (Tr. 10).

CONCISE ARGUMENT OF THE CASE

Summary of Argument

The only question presented by this appeal can be stated as follows:

Do the laws of the State of Washington permit police officers in that state to detain a person in jail for a reasonable length of time before charging or bringing such person before a magistrate in order that the police may investigate the circumstances surrounding the commission of a felony, where such person was legally arrested without a warrant on probable cause on suspicion of having committed the felony?

The answer is yes.

Housman v. Byrne, 9 Wn.2d 560, 115 P.2d 673;
State v. Winters, 39 Wn.2d 545, 236 P.2d 1038 (1951);

State v. Thompson, 58 Wn.2d 598, 364 P.2d 527 (1961);

State v. Self, 59 Wn.2d 62, 366 P.2d 193 (1961);

State v. Keating, 61 Wn.2d 452, 378 P.2d 703 (1963);

State v. Hoffman, 64 Wn.2d 445, 392 P.2d 237 (1964).

ARGUMENT OF APPELLEES

Appellant specifies as error part of Finding of Fact X (Tr. 18) and all of Finding of Fact XII (Tr. 19); and Conclusion of Law III (Tr. 20) (Appellant's Brief, pp. 4, 5). He does not, however, state wherein said Findings of Fact and Conclusion of Law are alleged to be erroneous, nor are these specifications of error supported by argument or any citation of authority. He also specifies as error Conclusions of Law IV and V and argues and cites authority in support of his argument that said Conclusions are erroneous. However, the authorities he cites do not support his position as will be shown herein.

It is therefore uncontroverted by appellant that "The detention of the plaintiff in the Seattle City Jail following his original arrest was for a period of time no greater or longer than was reasonable under the circumstances" (Finding of Fact XII, Tr. 19); and that such period of detention was no longer "than was reasonably necessary for the making of a prompt and expeditious investigation of plaintiff's participation or lack of participation in a theft of suitcases from the

Greyhound Bus Depot in Seattle, Washington" (Conclusion of Law III, Tr. 20).

As stated in the trial court's oral decision (St. 143, 144, 145), the preponderance of the evidence sustains the findings to which appellant assigns error, and these findings fully sustain the conclusions of law to which appellant assigns error.

Appellant's sole point on this appeal is that *any* detention of the appellant by the Seattle Police, while a court is open, without charging him or bringing him before a magistrate, is unlawful (Appellant's Brief, pp. 5, 6). This, no doubt, would be true if Rule 5(a) of the Federal Rules of Criminal Procedure were applicable in the State of Washington. However, such rule is not applicable in the State of Washington, *Swift v. United States* (10th Cir. 1963), 314 F.2d 860; *State v. Winters,* 39 Wn.2d 545, 236 P.2d 1038 (1951), and the two Washington cases relied upon by appellant do not support his position.

In *Housman v. Byrne,* 9 Wn.2d 560, 115 P.2d 673 (1941), relied on by appellant (Appellant's Brief, pp. 12, 13), the sheriff arrested plaintiff and held him in jail 11 days before charges were filed. On the trial of the criminal charge plaintiff was acquitted. Plaintiff's subsequent civil suit was dismissed and on appeal the court said at page 561 of the decision:

> " . . . the only question presented is whether the sheriff detained the appellant in jail for an un-

> reasonable time without taking him before a committing magistrate."

The court stated the general rule as follows:

> "... It is the general, if not the universal, rule that, when a person is arrested and placed in jail, and is detained there for more than a reasonable time, the detaining officer is liable in an action for damages."

The court goes on to say at page 562:

> "There are no facts before us which show any reason why the appellant was detained for the period of time that he was without being taken before a committing magistrate. There being no facts herein, the question is purely one of law. We are of the view that, without any showing of a necessity of detaining him for that period of time, the detention was unreasonable."

The court remanded the case for a new trial on the question of false imprisonment—that is, the jury was to decide whether, under all the facts of the case, the plaintiff had been detained an unreasonable length of time before being charged or taken before a committing magistrate.

In *Ulvestad v. Dolphin,* 152 Wash. 580, 278 Pac. 681, the other Washington case relied upon by appellant (Appellant's Brief, pp. 11, 12), the plaintiff was at home asleep when police officers of The City of Seattle, at the request of plaintiff's brother, pounded on plaintiff's window, awakened him, placed him under arrest, took him to the Seattle City Jail, held him for eight days and then released him. The plaintiff was not sus-

pected of having committed a crime, and his arrest was a *blatant false arrest.* During the eight days plaintiff was held in the city jail, the police were not investigating the circumstances of a crime, for no crime had been committed, and plaintiff's imprisonment was a *blatant false imprisonment,* the court holding that plaintiff had been falsely arrested as a matter of law. This case, despite the *obiter dictum* contained therein, simply is not in point on the question raised by this appeal. There was no issue as to whether the plaintiff had been held in jail a reasonable or unreasonable length of time to permit the police to investigate a felony. The court's discussion concerning confinement following a *lawful* arrest (pp. 589, 590) which is quoted by appellant at page 11 of his brief must therefore be considered as dicta which finds no support in any Washington decision dealing specifically with the reasonableness of the period of detention following a lawful arrest.

There are a number of cases in the State of Washington dealing with the question of what is a reasonable detention of a suspect while the police are investigating a felony for which the suspect was legally arrested on probable cause, and significantly, none of these cases refer to the isolated dicta of the *Ulvestad* case referred to above, or for that matter even cite the *Ulvestad* case. Such dicta is not in point and it is not the law of the State of Washington.

In the case of *State v. Winters,* 39 Wn.2d 545, 236

P.2d 1038 (1951), the defendant was arrested on February 3, 1950 and was held for six days following his arrest without being taken before a justice of the peace or being charged with a specific crime. A confession was obtained on the sixth day of his detention and was admitted in his trial. He appealed, contending that the confession was not admissible because it was obtained in violation of law. The Supreme Court of the State of Washington answered his contention, commencing at page 549 of the opinion as follows:

> "The appellant contends that the confession was not admissible because it was obtained six days after his arrest and without his having been taken before a justice of the peace, as a committing magistrate, in the meantime. He cites the statutes pertaining to procedure before a justice of the peace. It is, of course, somewhat similar to the procedure before United States commissioners, as provided for in Federal Rule 5 (a) of the Federal Rules of Criminal Procedure. He then cites *McNabb v. United States,* 318 U.S. 322, 87 L.Ed. 819, 63 S.Ct. 608, and *Upshaw v. United States,* 335 U. S. 410, 93 L.Ed. 100, 89 S.Ct. 170, to the effect that such a delay in bringing a prisoner before the commissioner makes a confession inadmissible. These cases are not in point. This is neither a Federal case nor a proceeding before a justice of the peace. The cases relied upon are not predicated upon either Washington state or Federal constitutional provisions, but only on a rule of procedure. There is no constitutional or statutory provision in the State of Washington having to do with the use of confessions as evidence against a defendant in a criminal trial, except Rem. Rev. Stat. § 2151. Under the purview of the statute it was not error to admit the confession."

In *State v. Thompson,* 58 Wn.2d 598, 364 P.2d 527

(1961), the defendant was arrested without a warrant, the officers having reasonable grounds to believe that he had committed a felony. He was held in jail six days before he was charged with a crime, during which time the officers were investigating the circumstances of the felony and were questioning the defendant. During five days of his detention the defendant made several confessions. At his trial, the defendant was convicted of second degree murder, and on appeal alleged, among other things, that his confinement for six days, prior to his arraignment, was illegal. In disposing of this contention and in sustaining defendant's conviction, the Washington court states at page 606:

> "The appellant was arrested for the attempted rape of Sharon Sharp, but, in accord with the local police custom, he was held on an open charge by being booked for intoxication while an investigation of the attempted rape of Sharon Sharp and the murder of Mrs. Tussing was being made. He was arraigned on the instant charge six days after his arrest. At that time, the court appointed counsel for him.
>
> "Appellant now contends that his confinement on an *open charge* prior to his arraignment was illegal.
>
> "We do not agree. Appellant was legally arrested for a felony. He was held on a so-called open charge to permit a reasonable investigation before the filing of an information. The police record or *booking* is not the charge upon which a defendant goes to trial and has no particular significance after a formal charge has been lodged. Had he cared to question his confinement prior to filing the information, he could have done so by habeas corpus. After the filing of an information, habeas corpus will not lie."

In the case of *State v. Keating,* 61 Wn.2d 452, 378 P.2d 703 (1963), the Washington court again expressly rejected the rule announced in *McNabb v. United State,* 318 U.S. 322, 87 L.Ed 819, 63 S.Ct. 608, citing *State v. Winters,* 39 Wn.2d 545, and *State v. Self,* 59 Wn.2d 62, 366 P.2d 193 (1961), a case in which the United States Supreme Court denied certiorari in 370 U.S. 929, 8 L.Ed.2d 508, 82 S.Ct. 1569.

In the case of *State v. Hoffman,* 64 Wn.2d 445, 392 P.2d 237 (1964), the defendant contended that his motion to suppress two incriminating statements given by him during his four-day detention and before he was charged or brought before a magistrate, should have been sustained by the trial court for two reasons. First, he claimed his detention became unlawful when he was not taken forthwith before a magistrate following his arrest; and secondly, he alleged that he was held incommunicado and denied the right to counsel until he had given the statements.

The Washington court indicated that it was thinking in terms of the impact of the Fourteenth Amendment when it answered Hoffman's contentions at page 450 as follows:

> "By contention (a) defendant, in effect, again urges upon us the adoption of a rule of exclusion akin to the 'McNabb rule' (*McNabb v. United States,* 318 U.S. 332, 87 L.Ed. 819, 63 S.Ct. 608 (1943)). Although we do not and will not abide the practice of holding persons for unreasonable times without charge and arraignment, we have

> heretofore refrained from adopting the *McNabb* rule of exclusion. Instead, we have relied upon the ultimate test of 'voluntariness' in determining admissibility of confessions. (Citing cases.)
>
> "It may well be that future developments, or a conviction that law enforcement agencies of the state are persistently indulging in undue and extensive delays between arrest and arraignment, may dictate a reconsideration of our position. Until that time, however, we adhere to our present approach."

Hoffman's conviction was sustained.

Appellant's only support for the rule he urges upon this court is Rule 5 (a) of the Federal Rules of Criminal Procedure, but such rule has no application in the case at hand. In *Swift v. United States,* (10th Cir., 1963), 314 F.2d 860, the court states at page 862:

> "... Rule 5(a), which requires that a person who is arrested be taken before a Commissioner without unnecessary delay, is involved only when an officer makes an arrest under federal law. It has no application in this instance since the record here is clear that, at the time the statement was made by Swift, he had been arrested on a state charge, and was in the sole custody of state officers ... There is nothing in the record which indicates that Swift was being unlawfully detained by the state officers or anyone else, at the time he made the statement to Kramer ... "

An illustration of the rule that state and not federal criminal procedures apply in determining whether the rights of a state criminal defendant have been violated is *Gallegos v. Nebraska,* 342 U.S. 55, 72 S.Ct. 141, 96 L.Ed 86, in which a thirty-eight year old Mexican farmhand was not brought before a magistrate for fifteen

days following his arrest. During the interim, he confessed to facts upon which he was later convicted of manslaughter. On appeal to the Supreme Court of the United States, this conviction was affirmed. The petitioner claimed on appeal that admission of his confession into evidence violated his rights under the due process requirement of the Fourteenth Amendment. The court cited *Malinski v. New York,* 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029, quoting from that opinion as follows:

> " ' . . . the use of any confession obtained in violation of due process requires the reversal of a conviction even though unchallenged evidence, adequate to convict, remains . . . ' "

The court nevertheless sustained the conviction, it appearing to the court that under the laws of Texas and Nebraska where the petitioner's detention took place, the detention did not clearly violate the Fourteenth Amendment.

The Washington authorities cited above demonstrate that in the State of Washington there is no statute or judicial precedent fixing any specified time within which a lawfully arrested person must be charged with a specific crime. It is made clear in *Housman v. Byrne,* 9 Wn.2d 560, and *State v. Thompson,* 58 Wn.2d 606, however, that a law enforcement agency has a "reasonable time" within which to charge the arrested person with a crime or bring him before a committing magistrate. The *Housman* case also makes it clear that the

court will consider evidence of justification where there is an allegedly unreasonable delay.

Appellant, on page 15 of his brief, cites 98 A.L.R.2d 1011, § 17 (a) for the propisition that in most jurisdictions delay for purposes of investigation is not an acceptable excuse. In the same annotation at page 1014, § 17 (b), under the heading "Delay for investigation or consultation held justified" it is stated that in some jurisdictions a suspect may be held for a reasonable time to permit an investigation, and Washington is one of those jurisdictions.

Appellant mentions on pages 9 and 10 of his brief that an investigation of a felony can be made while a suspect is at liberty on bail, but it is obvious that an ill-considered charge may not be filed merely for the purpose of fixing bail.

The other cases relied upon by appellant are similarly not in point. In *Von Arx v. Shafer,* 241 F. 649 (CCA 9, Alaska, 1917), (Appellant's Brief, page 16), the Federal statute applicable in Alaska provided that one arrested without a warrant be brought before a magistrate "without delay."

Runnels v. United States, 138 F.2d 346 (CCA 9, Wash. 1943), (Appellant's Brief, page 16), was a Federal criminal case and was governed by Federal law, and although the court referred to Washington law by way of dicta, the court stated at page 347:

"The case (at bar) clearly falls within the rule

of *McNabb v. United States* and *Anderson v. United States,* supra."

These two Federal cases, in their application to the case at bar, can be correctly characterized in the language of the Washington Supreme Court in *State v. Winters,* 39 Wn.2d 545, 236 P.2d 1038 (1951), when it spoke of the *McNabb* case and one other Federal case, at page 549:

> " . . . These cases are not in point. This is neither a Federal case nor a proceeding before a justice of the peace. The cases relied upon are not predicated upon either Washington state or Federal constitutional provisions, but only on a rule of procedure . . . "

Appellant, at page 18, 19 and 20 of his brief, discusses the "question of damages." The trial court made no finding or conclusion on damages, and it is submitted that no question in regard thereto is before this court on this appeal and that such portion of appellant's brief should therefore be disregarded.

CONCLUSION

In the State of Washington one who is legally arrested on suspicion of having committed a felony may be held in jail for a reasonable time before being charged or taken before a magistrate while the police are investigating the circumstances of the felony. The trial court found on uncontroverted evidence that:

> " . . . the detention of the plaintiff Notaras by and on behalf of the defendant Ramon, as Chief of Police of the City of Seattle, was for a period

no greater or longer than for a reasonable time . . . *It (the investigation) was a fair, needful, essential and reasonable inquiry for a detective to make in his laudable efforts to make sure that a possibly innocent man would not be unlawfully charged . . .*" (St. 143).

It is submitted that the judgment of the trial court should be sustained.

Respectfully submitted,

A. L. Newbould
Corporation Counsel
Charles R. Nelson
Assistant.
Attorneys for Appellees.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Charles R. Nelson
Of counsel for Appellees